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April 30, 2010

By e-filing

Ms. Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

226916

Re: Docket No. AB-1036, *The City of Chicago, Illinois -- Adverse Abandonment --  
Chicago Terminal Railroad in Chicago, IL*

Dear Ms. Brown:

Hereby transmitted is Applicant's Rebuttal Statement for filing with the Board in the  
above referenced matter.

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
*Attorney for the City  
of Chicago, Illinois*

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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THE CITY OF CHICAGO, ILLINOIS --	)	
ADVERSE ABANDONMENT --	)	DOCKET NO.
CHICAGO TERMINAL RAILROAD IN	)	AB-1036
CHICAGO, IL	)	

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APPLICANT'S REBUTTAL STATEMENT

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THE CITY OF CHICAGO, ILLINOIS  
CITY HALL  
121 North LaSalle Street  
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Applicant

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Attorneys for Applicant

DATE FILED: April 30, 2010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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**APPLICANT'S REBUTTAL STATEMENT**

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Pursuant to the Board's procedural decision in this proceeding served on February 18, 2010, as modified by decisions served March 4, 2010 and April 13, 2010, Applicant CITY OF CHICAGO, ILLINOIS (the City) hereby files this Rebuttal Statement.

**BACKGROUND**

On February 1, 2010, the City filed an Application for Adverse Abandonment of two unused segments of rail line in Chicago, IL operated by Chicago Terminal Railroad (CTM):

- (1) a portion of CTM's Kingsbury Branch from its southern terminus at the intersection of Kingsbury, Division, and Halsted Streets to, but not including, the point at which CTM's Goose Island Branch diverges from the Kingsbury Branch at or near Willow Street, a distance of approximately six city blocks (approximately .75-mile) ("the Kingsbury Segment"); and
- (2) a portion of the Lakewood Avenue Line between the southwest right-of-way line of Clybourn Avenue and the Line's northern terminus at Diversey Parkway, a distance of approximately seven city blocks (.875-mile) ("the Lakewood Segment").

The rail carrier that operates the Kingsbury and Lakewood Segments, CTM, does not oppose their abandonment. By letter to the Board dated March 26, 2010, CTM has advised the Board that it will not file a protest against the proposed abandonment.

On March 18, 2010, Andrew Morris (Mr. Morris) filed Comments on the Application. This Rebuttal Statement is in response to Mr. Morris's Comments. As set out below, those Comments are not entitled to consideration because Mr. Morris does not have standing to challenge the propriety of the proposed abandonment, and even if Mr. Morris had standing, his Comments do not refute the City's showing that the abandonment is permitted by the present and future public convenience and necessity.

### **REBUTTAL**

#### **I. MR. MORRIS DOES NOT HAVE STANDING**

The irreducible constitutional minimum of standing contains three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). For the first element, it must be shown that the proposed abandonment would cause concrete and particularized harm that is actual and imminent. *American Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (DC Cir. 2000); *Sierra Club v. EPA*, 292 F.3d 895, 898 (DC Cir. 2002).

Mr. Morris has not alleged, let alone shown, that the proposed abandonment would injure him in any way. Mr. Morris's residence at 4109 West Crystal Street in Chicago is not located adjacent to, or even nearby, either of the rail lines proposed for abandonment. Mr. Morris does not allege that he owns or operates a business adjacent to either of those rail lines, nor even that he is employed by such a business. Mr. Morris is employed as a construction standards engineer

by Commonwealth Edison Company at Oakbrook Terrace, IL, which is many miles away from the rail lines under consideration.

In sum, Mr. Morris has failed to show that he has any legitimate interest in the rail lines proposed for abandonment, let alone that he would be injured in any way as a result of their abandonment. In the absence of a showing of injury, it is not necessary to consider that other requirements of causation and redressability. It is thus shown that Mr. Morris does not have standing to oppose the proposed abandonments. Accordingly, Mr. Morris's Comments are not entitled to consideration in determining the propriety of the proposed abandonment.<sup>17</sup>

**II. EVEN IF MR. MORRIS HAD STANDING, HIS COMMENTS DO NOT REFUTE THE CITY'S SHOWING THAT THE PROPOSED ABANDONMENT IS PERMITTED BY THE PRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY**

**A. THE LAKEWOOD SEGMENT**

The Comments are ambiguous as to Mr. Morris's position in regard to the proposed abandonment of the Lakewood Segment. Thus, at page 1 of the Comments, Mr. Morris states:

... I support the abandonment of a portion of the Lakewood branch segment proposed for abandonment ...

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<sup>17</sup> Even if Mr. Morris had legitimate standing, his filing of Comments on the proposed abandonments rather than a Protest against them is indicative of his limited interest in the matter. Thus, at page 3 of the procedural decision in this proceeding, served February 18, 2010, the Board said:

... Persons who may oppose the proposed adverse abandonment but do not wish to participate fully in the process by submitting verified statements of witnesses containing detailed evidence should file comments. Persons opposing the proposed adverse abandonment who wish to participate actively and fully in the process should file a protest ...

Mr. Morris's filing of Comments rather than a Protest signals his intention not to participate fully in the process.

However, at pages 15 and 16 of the Comments, Mr. Morris states that the Board should authorize abandonment of the Lakewood branch “north of Diversey Avenue” (sic), but should deny abandonment “south of Diversey Avenue” (sic).

There is no abandonment proposed north of Diversey Parkway (not Avenue). Consequently, Mr. Morris’s statement of position on abandonment “north of Diversey Avenue” reflects his lack of familiarity with the local area, and the Application for Adverse Abandonment. Mr. Morris’s statement of opposition to abandonment “south of Diversey Avenue” is directly contradictory of his statement at page 1 of support for abandonment of the portion of the Lakewood Segment proposed for abandonment, all of which is located south of Diversey Parkway.

In any event, the discussion in the Comments appears to reinforce Mr. Morris’s support for abandonment of the Lakewood Segment. Thus, at page 6, Mr. Morris unequivocally states:

It is clear that, under the current zoning plan, there is no reasonable prospect for any future rail shipping or receiving on the Lakewood line . . . <sup>2/</sup>

In sum, nothing in Mr. Morris’s Comments refutes the showing in the City’s Application that abandonment of the Lakewood Segment is permitted by the present or future public convenience and necessity.

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<sup>2/</sup> At pages 7 and 8 of the Comments, Mr. Morris alleges that even if there were a present or future public need for rail service on the Lakewood Segment, such need would be outweighed by other interests as to the portion of the Lakewood Segment north of Fullerton Avenue (sic), but not as to the portion of that Segment south of Fullerton Avenue. Assuming the validity of those allegations for the purpose of argument, they would provide an additional ground for abandonment of the portion of the Lakewood Segment north of Fullerton Parkway, but they would not affect the support for abandonment of the portion of the Lakewood Segment south of Fullerton Parkway that results from an absence of public need for that portion of that Segment.

**B. THE KINGSBURY SEGMENT**

Mr. Morris has failed to refute the City's evidence that the present and future public convenience and necessity permit abandonment of the Kingsbury Segment.

Thus, as to the tiny parcel on the east side of Kingsbury at the south end of the Segment, Mr. Morris states that the City has ignored the possibility of obtaining a creative proposal for manufacturing or another rail-friendly use (at 10). However, Mr. Morris's position in that respect is thoroughly undermined by his own statement at page 4, note 11, viz.:

Although . . . the M-class zoning on these parcels does not absolutely forbid uses that would generate rail traffic, each of the five lots involved appear (sic) to be about 25 by 125 feet, which is highly unlikely to be large enough to generate any useful traffic even if their uses changed.

As to the larger parcel on the west side of Kingsbury Street at the south end of the Segment, Mr. Morris has not attempted to refute the City's evidence that the City aggressively, but unsuccessfully, offered that parcel for development just a few years ago.

As to the Carbit Paint facility alleged to be "equipped for direct rail service" (Comments at 10), there is no evidence that Carbit Paint has ever used the Kingsbury Segment. Notably, Mr. Morris agrees that any claim of potential for future use of the Segment by Carbit Paint is "speculative." (*Id.* at 10-11).

Mr. Morris has not refuted, nor even attempted to refute, the evidence that except for an isolated test shipment of firewood, there has been no rail use of the Kingsbury Segment in more than 10 years. In that circumstance, there is no realistic potential for rail service over the Kingsbury Segment. In that respect, see *Grand Trunk W. R.R. -- Adverse Discon. of Trackage Rights*, 3 S.T.B. 124 (1998), where the Board said (at 128):

Here, the public convenience and necessity supports the requested grant of discontinuance authority. For the past 11 years, no rail service has been provided on the line. Because of the projected public uses of the railroad right-of-way and surrounding property, there is no public interest in 'continuing' and no likelihood of reactivating rail service on the line . . .

An isolated test shipment of firewood is not indicative of a legitimate demand for rail service, but even if that had been a recurring revenue shipment in the ordinary course of business, it would not be sufficient to establish a public need for rail service. In that respect, *see Denver & Rio Grande Ry. H.F. -- Adv. Aban. -- in Mineral County, CO*, 2008 STB LEXIS 284 (Docket No. AB-1014 [decision served May 23, 2008]), where the Board said (at \*25):

. . . if the prospect for traffic were to materialize some day, it would amount to only 1-3 carloads per year, an amount so small that it does not weigh against abandonment under the PC&N test.

#### **CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for the reasons stated, Mr. Morris's Comments should be rejected for lack of standing to oppose the proposed abandonment. If those Comments are not so rejected, the Board should find that they do not refute the evidence and argument in the Application for Adverse Abandonment that abandonment of the Kingsbury and Lakewood Segments is permitted by the present and future public convenience and necessity. For either or both of those reasons, the Board should grant the abandonment authority sought in that Application.



Respectfully submitted,

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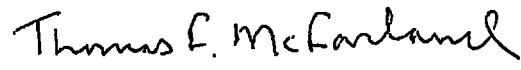
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Attorneys for Applicant

DATE FILED: April 30, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2010, I served the foregoing document, Applicant's Rebuttal Statement, by overnight mail, on Andrew R. Morris, 4109 West Crystal Street, Chicago, IL 60651-1833, and John D. Heffner, Esq., John D. Heffner, PLLC, 1750 K Street, N.W., Suite 200, Washington, DC 20006.

  
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Thomas F. McFarland